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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(El Dorado)

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON MICHAL BAUTHUES,

Defendant and Appellant.

C073686

(Super. Ct. No. P13CRF0033)

A complaint charged defendant Jason Michal Bathues with receiving stolen property (Pen. Code, § 496, subd. (a)),¹ false personation of another incurring liability (§ 529, subd. (a)(3)), and (misdemeanor) unlawful making of a motor vehicle key (§ 466.6). The complaint also alleged defendant had a prior strike conviction and had served six prior prison terms.

¹ Further undesignated statutory references are to the Penal Code in effect at the time of defendant's offenses.

Defendant pleaded no contest to receiving stolen property and false personation. The remaining charge, strike, and prior prison term allegations were dismissed. The trial court sentenced defendant to the stipulated aggregated term of two years and eight months in state prison. The court reserved jurisdiction over restitution and awarded restitution at a later hearing, which we describe *post*.

Defendant appeals from the postjudgment orders orally entered at the restitution hearing held on March 22, 2013, contending the trial court erred in ordering restitution to two victims and the abstract of judgment improperly reflects restitution to a third. Defendant also purports to challenge his credit award of 63 days, which was part of his sentence imposed on February 6, 2013.

As we will explain, we will strike the trial court's extant restitution orders and remand for a new restitution hearing. We will leave correction of credits to the trial court, as it retains jurisdiction to make the necessary correction.

FACTS

The parties stipulated to the complaint as a factual basis, without any discussion or elaboration. The complaint provides in relevant part as follows: In January 2013, defendant unlawfully bought, received, concealed, sold, and/or withheld stolen personal checks, identification, and a laptop computer and organizer, knowing that property had been stolen and obtained by extortion. Defendant also unlawfully and falsely personated Brian Little, in his private or official capacity, which might have subjected Little to liability for a lawsuit, to pay money or incur a debt or might have accrued to defendant's or another's benefit.

No presentence report was prepared, no preliminary hearing was held, and no other facts are included in the record. The motion to suppress (§ 1538.5; never litigated) describes a search of defendant and a car that he was sitting in, within the parking lot of a casino, but does not explain or otherwise hint at how he came to be charged with receipt

of stolen property. Nor does it refer to any property other than that listed in the complaint and recounted above.

DISCUSSION

I

Restitution

A. Defense Counsel's Absence from the Hearing

At the time of sentencing, the restitution hearing was set for February 20, a date selected by defense counsel. According to the minutes, defense counsel appeared with defendant on February 20, at which time (for reason unknown to us)² the hearing was continued to March 22, with a confirmation date on March 20. The minutes reflect defense counsel was in court with defendant on March 20 when the court confirmed the restitution hearing for March 22.

On March 22, defendant appeared *without counsel* for a reason completely unexplained by the portion of the record provided to us. Defendant was not classified as *propria persona*. All relevant records reflect that defendant was present in custody, but his lawyer was not present, a fact which was not even acknowledged at the hearing. Defendant now claims this absence of counsel was fatal to the restitution orders entered at the March 22, 2013 hearing. The People agree, and so do we.

“A criminal defendant has the right under the state and federal Constitutions to be personally present and represented by counsel at all critical stages of the trial. . . . As to the right to counsel, a critical stage is one ‘in which the substantial rights of a defendant are at stake’ [citation], and ‘the presence of his counsel is necessary to preserve the defendant’s basic right to a fair trial.’ [Citation.]” (*People v. Bryant* (2014) 60 Cal.4th 335, 465.) A sentencing hearing is a critical stage of the proceeding (*People v. Bauer*

² The record provided to us does not contain transcripts of the February 20 and March 20 hearings.

(2012) 212 Cal.App.4th 150, 155) and “a hearing on an amount of restitution to be made to [a] victim . . . is part and parcel of the sentencing process.” (*People v. Cain* (2000) 82 Cal.App.4th 81, 87.)

Because defendant was deprived of counsel at this critical stage of the proceedings, and prejudice to defendant (in the form of multiple restitution awards made without defendant having any opportunity to contest them) resulted from that deprivation, we must strike the resulting restitution orders and remand for a new hearing.³

B. *Restitution Awards*

Defendant next challenges the awards themselves, claiming there “is no indication from the evidence . . . that the amounts ordered by the court are related to the crimes for which [defendant] was convicted, or that the alleged victims are connected in any way to the crimes [defendant] was convicted of.” He also points out--correctly--that the award to Umbalin appearing in the abstract was never orally ordered. The People argue these claims are moot, given that they have conceded remand is necessary. The People do not argue the restitution awards were based on sufficient evidence. We briefly address the

³ Contrary to defendant’s argument, the trial court may hold additional restitution hearings as necessary in this case. Section 1202.46 expressly provides: “[W]hen the economic losses of a victim cannot be ascertained at the time of sentencing pursuant to subdivision (f) of Section 1202.4, the court shall retain jurisdiction over a person subject to a restitution order for purposes of imposing or modifying restitution until such time as the losses may be determined. Nothing in this section shall be construed as prohibiting a victim, the district attorney, or a court on its own motion from requesting correction, at any time, of a sentence when the sentence is invalid due to the omission of a restitution order or fine without a finding of compelling and extraordinary reasons pursuant to Section 1202.4.” Victim restitution under section 1202.4 is not punishment for double jeopardy purposes, it is a civil remedy. (*People v. Harvest* (2000) 84 Cal.App.4th 641, 647, 650.) There is no express statute of limitations on victim restitution (*id.* at p. 652), and here the issue of victim restitution was expressly reserved by the court. Strong public policies promote full reimbursement to crime victims for their losses. (*Ibid.*)

restitution awards in the interest of judicial economy, in order to provide guidance for future proceedings.

At the March 22, 2013, restitution hearing, the three victims at issue here submitted verified claims for restitution. Umbalin submitted a claim for \$750. Sosebee submitted a claim for \$50, based on a check that was taken from his daughter when her car was stolen. Jagers submitted a claim for \$600, describing that her car window was smashed and a purse and two gift cards were stolen. At the hearing, the trial court ordered defendant to pay restitution to Jagers and Sosebee based on the verified claim forms, stating: “The Court will order restitution in that amount. ¶¶ I’ll just reserve on the rest, thank you.” The court did not hear evidence, argument, or discuss these two claims further. The court did not mention Umbalin’s claim at all.

C. Restitution -- The Law

In this case, defendant was sentenced to prison as opposed to probation. This distinction is significant for many reasons, including restitution award requirements.

“The scope of the trial court’s authority with respect to victim restitution depends on whether the restitution is ordered pursuant to section 1202.4 or as a condition of probation pursuant to section 1203.1. ‘[U]nder section 1203.1, ‘California courts have long interpreted the trial courts’ discretion to encompass the ordering of restitution as a condition of probation even when the loss was not necessarily caused by the criminal conduct underlying the conviction.’ [Citation.]’ In contrast, section 1202.4 provides: ‘It is the intent of the Legislature that a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant *convicted of that crime.*’ (§ 1202.4, subd. (a)(1), italics added.) Accordingly, ‘when a court imposes a prison sentence following trial, section 1202.4 limits the scope of victim restitution to losses caused by the criminal conduct for which the defendant sustained the conviction.’ [Citation.] As our Supreme Court has explained: ‘When section 1202.4 imposes its mandatory requirements in favor of a victim’s right to restitution, the statute

is explicit and narrow. When section 1203.1 provides the court with discretion to achieve a defendant's reformation, its ambit is necessarily broader, allowing a sentencing court the flexibility to encourage a defendant's reformation as the circumstances of his or her case require.' [Citation.]" (*People v. Rahbari* (2014) 232 Cal.App.4th 185, 190.)

"The burden is on the party seeking restitution to provide an adequate factual basis for the claim." (*People v. Giordano* (2007) 42 Cal.4th 644, 664.) We review the trial court's restitution order for abuse of discretion. (*Id.* at p. 663.) "No abuse of discretion will be found where there is a rational and factual basis for the amount of restitution ordered." (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542.)

D. Analysis

1. Umbalin

The trial court did not orally award Umbalin restitution. Nor does her name appear in the actual restitution order. Yet the award appears in the minute order and abstract of judgment. No restitution award to Umbalin should appear in the minute order or abstract, as the trial court did not make the order. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185-186 (*Mitchell*).)

2. Solesbee and Jagers

Defendant was convicted for receiving stolen property, including checks. Solesbee submitted a verified claim form, swearing under penalty of perjury that a check of his had been stolen and he had sustained \$50 in losses as result of that theft. This was sufficient evidence to support his award.

Jagers' verified claim was for a shattered window, a Coach purse, and two gift cards. The factual basis for defendant's relevant crime of conviction indicated that he was in possession of "stolen personal checks, identification, a laptop computer and organizer." There is nothing in the record that connects *defendant's offense* to Jagers' losses. In the absence of additional facts, there is *no* evidence connecting defendant and

his receipt of stolen checks, identification, and a laptop to Jagers' losses. This is not sufficient evidence to support the March 22, 2013, restitution award to Jagers.

II

Presentence Custody Credits

At the time of defendant's sentencing, on February 6, 2013, the trial court (Saint Evans, J.) awarded defendant 63 days of custody credit. On this appeal from the postjudgment restitution orders, both parties agree defendant's credits properly total 65 days rather than 63. On July 9, 2013, the trial court (Phimister, J.) denied defendant's request to correct the amount pursuant to section 1237.1, finding defense counsel had stipulated to the custody credits.

Defendant now asks us to correct the credit award. The People respond that defendant has untimely appealed from the credit award entered at his sentencing; they are correct. The notice of appeal (filed on April 29, 2013) is outside the required 60 days from rendition of judgment. (Cal. Rules of Court, rule 8.308(a).) Because we currently lack jurisdiction over the orders entered at the sentencing hearing, we have no power to give relief as to that particular order. (See *In re Chavez* (2003) 30 Cal.4th 643, 650.) The trial court, however, may correct the error on remand.⁴ (See *People v. Gisbert* (2012) 205 Cal. App. 4th 277, 282 ["the award of presentence custody credits was an unauthorized sentence, which the trial court had jurisdiction to correct at any time"]; see

⁴ We are compelled to note that it is clear from the record that defense counsel did *not* stipulate to 32 days of actual credit; he merely calculated an incorrect number, thereby inadvertently shorting his client one day. In response to the trial court's inquiry about custody credits, counsel answered, "He was taken in on January 5th, your Honor. So that would be, I think, 32 days." The date was correct, but the math was not. The sentencing judge then obtained a stipulation from the People to that same incorrect number, and then awarded the credit without checking the parties' math. We see no valid reason for the trial court to decline to make the necessary correction when asked to do so.

also *Mitchell, supra*, 26 Cal.4th at 185 [explaining appellate courts *with jurisdiction* may correct credit errors in abstracts of judgment].)

DISPOSITION

The restitution orders are vacated and the case is remanded for a new hearing on restitution. The trial court is directed to ensure the resulting abstract of judgment correctly reflects any restitution ordered and credits earned, and to provide a certified copy thereof to the Department of Corrections and Rehabilitation.

DUARTE, J.

We concur:

BLEASE, Acting P. J.

HULL, J.